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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

WEIGERT-DAGEN, WEIGERT-DAGEN SHOE CO.,
J. F. GOLDKAMP & CO.,
Petitioners,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

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December, 1951.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Petitioners, Weigert-Dagen, Weigert-Dagen Shoe Co. and J. F. Goldkamp & Co., pray that a writ of certiorari be issued to review the judgment of the United States Court of Customs and Patent Appeals in the case of *The United States* v. *Weigert-Dagen, Weigert-Dagen Shoe Co., J. F. Goldkamp & Co.*, entered November 5, 1951, reversing a judgment of the United States Customs Court rendered September 12, 1950.

Opinions Below

The opinion of the United States Customs Court is reported in 25 Cust. Ct. 105, C. D. 1272 (R. 264-277). The opinion of the United States Court of Customs and Patent Appeals, 39 Ct. Cust. Appls. (Customs)——, C.A.D. 464 (R. 278-290) is reported in the advance weekly Treasury Decisions Vol. 86, No. 41, October 11, 1951, page 37.

Jurisdiction

The original decision of the United States Court of Customs and Patent Appeals was rendered on June 26, 1951. A petition for rehearing was denied on September 28, 1951. A second petition for rehearing was denied November 5, 1951 when final judgment was entered.

The jurisdiction of this Court is invoked under 28 U.S.C. (1946 ed., Supp. 4) § 1256.

Statutes Involved

Paragraph 1530(e), Tariff Act of 1930 (46 Stat. 667; 19 U.S.C. Sec. 1001) (set forth in the Appendix, infra) as modified by the "Trade Agreement between the United States of America and the United Mexican States", signed December 23, 1942 and proclaimed by the President on December 31, 1942 (57 Stat. 833, 892), the pertinent portion of which is set forth in the Appendix, infra, as negotiated under the authority of the "Trade Agreements Act" of June 12, 1934, Sec. 350, Tariff Act of 1930 (48 Stat. 943; 19 U.S.C. Sec. 1351) as extended by the joint resolutions of Congress of March 1, 1937 and April 12, 1940.

Statement of Fact

The collectors of customs at Laredo, Texas, and St. Louis, Missouri, on instructions from the Commissioner of Customs, declined to classify certain imported Mexican footwear under the provisions of the Mexican Trade Agreement which lowered the duty from 20% to 10% ad valorem on imported huaraches and slippers for housewear.

The trial court, the United States Customs Court, reversed the action of the collectors (1) as to certain items of footwear which the court found were "huaraches" within the common and commercial meanings of that term,

and (2) as to certain other items which were found to be slippers for housewear.

On appeal, the court below, the United States Court of Customs & Patent Appeals, reversed the action of the trial court one judge dissenting. In so doing the court below held that where trade witnesses were not in complete agreement about the meaning to be given to a new ambiguous term—*i.e.* "huaraches"—in a trade agreement between the United States and a foreign sovereign state, a description of this word contained in "Digests of Trade Data" published by the United States Tariff Commission five months after the agreement was made could be adopted by the court as establishing the meaning to be given to this word because such a definition indicated the intentions of the trade agreement negotiators. This conclusion was not altered by the fact that this "Digests" description was "drawn from" detailed confidential data made available to the U. S. Trade Agreements Committee only, and was not shown by the evidence before the court, or otherwise, to be acceptable to the Mexican negotiators of the agreement, to the trade of either country, or to the U. S. Bureau of Customs. Nor was it altered by the fact that this "Digests" description (1) was different from the descriptions and practical constructions given to this word by the U. S. Department of State on the date when the agreement was signed, and (2) was subsequently revised by the Tariff Commission itself.

Two petitions for rehearing requesting the court below to reconsider its decision were denied.

Questions Presented

(1)

In ascertaining the meaning of doubtful and ambiguous words in a reciprocal trade agreement between the United States and Mexico, should "Digests of Trade Data" be considered to evidence the common or joint intent of both

Mexican and United States negotiators, where it appears that the "Digests" are a publication made and issued by the U. S. Tariff Commission after the effective date of the trade agreement[1], and shown by a foreword (set forth in Appendix, infra) of said "Digests" to contain material which has been "drawn from" data made available to the American negotiators only—*i.e.*, the U. S. Trade Agreements Committee; and not shown by the "Digests" or by the proof and record of this case to have been furnished and made available to the Mexican negotiators prior to or during the negotiations leading to the execution of the trade agreement?

(2)

In ascertaining the meaning of a doubtful and ambiguous word (such as "huaraches") in a reciprocal trade agreement treaty[2] (such as between the United States and Mexico), should a description of this word (see Appendix, infra) published in "Digests of Trade Data" by the United States Tariff Commission[3] five months after the treaty is executed[4] be given preference over the descriptive material[4]

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[1]—The Trade Agreement with Mexico was signed on December 23, 1942, and the "Digests of Trade Data" were published May 17, 1943—(R. 306-307).

[2]—A reciprocal commercial agreement is a treaty although not of the kind requiring ratification by the Senate—B. Altman & Co. v. United States, 224 U.S. 583, 25 C.J.S. p. 154 Sec. 18, note. 54.

[3]—The United States Tariff Commission was created by Congress on September 8, 1916 (39 Stat. 795) to supply Congress and the President with information about the position of U. S. industries in competition with imports, the operation of the U. S. customs laws, and the commercial policies of foreign countries. See also 42 Stat. 858, 46 Stat. 696, 48 Stat. 943, 62 Stat. 1248. Executive Order 10082 of 10/5/49.

[4]—In the "Analysis of General Provisions and Reciprocal Concessions" relative to the Trade Agreement with Mexico as published by the U. S. Department of State on December 23, 1942, the date when the Mexican Trade Agreement was signed, the term "huaraches" is defined as "woven-leather sandals"—Department of State Bulletin December 26, 1942 Supplement, Vol. VII, No. 183-A—Publication 1861, page 1051.

and practical constructions[5] given to this word on the day the agreement is signed by the United States Department of State which conducted the treaty negotiations on behalf of the United States government, and where it further appears that the description of the word in the "Digests" is subsequently revised, altered and corrected by the U. S. Tariff Commission itself[6]?

(3)

In ascertaining the meaning of doubtful and ambiguous words in reciprocal trade agreements between the United States and foreign countries designed and intended on their face "for the promotion of trade" or for "expanding the production and exchange of goods" (Preamble, each trade agreement), where all diplomatic correspondence and negotiations relating to such agreements are confidential and not available for public examination, and, as a result, the actual intentions of the negotiators for the respective countries cannot be readily ascertained, should such words be given a limited meaning not shown to be accepted commonly or by commercial men in either country who trade in the commodity related to such words, so as to embrace only those particular designs and styles of imported articles that were handled commercially prior to the execution of a trade agreement, and thus restrict the application of the trade agreement provisions in such a way as to stabilize and confine the flow of international trade only to pre-

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[5]—On page 1033 of said "Analysis" by the Department of State, Publication 1861 (footnote [4], supra) it is stated:

"Huaraches make up practically all imports of women's, misses' and children's shoes coming from Mexico".

[6]—In the "Summaries of Tariff Information — 1948" Vol. 15, Part 6, pages 115-116, the U. S. Tariff Commission redefined the term "huaraches" and omitted all reference to the qualifying language (as originally used in 1943 in the "Digests of Trade Data") stating that "the heel is nailed on". Many of the items in suit do not have nailed-on heels.

existing designs and styles[7], or should such words be given a liberal meaning in accord with the practical constructions indicated by the U. S. Department of State and generally accepted commonly and in the trade in each negotiating country by commercial men who deal in the commodity related to such words, which liberal meaning embraces old and new designs and styles of the commodity, and thus tend to stimulate and expand the flow of international trade covered by the provisions of trade agreements?

(4)

Should a reciprocal trade agreement, a compact between two independent nations be construed and interpreted as though it were a unilateral legislative act of the Congress of the United States, in respect to which legislative act it is proper for the court to resort to Congressional debates and hearings as extraneous aids "under the established rules of evidence" in order to determine the meaning of doubtful and ambiguous words?

(5)

Is it an abuse of judicial discretion warranting the exercise of the supervisory powers of this Court for an appellate court to decline timely requests (1) to correct unproven assumptions not of common knowledge that are used by the appellate court as the basis for reversing a trial court, and (2) to reconsider reversal action taken on merchandise that was not before the appellate court for review[8] and permit appellee, who pleads surprise, to argue

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[7]—Imports of footwear from Mexico, mostly huaraches, have declined from a high of 4,700,000 pairs in 1943 when the Mexican trade agreement became effective to only 276,000 pairs in 1947—1948 "Summary of Tariff Information" by U. S. Tariff Commission, page 116.

[8]—The lower court reversed the trial court as to merchandise represented by Exhibits 1, 40, 41, 42 and 43, which items were not covered by appellant's Assignments of Error (R. 2).

on matters voluntarily considered by the court without notice to appellee that the court would voluntarily entertain jurisdiction[9], where it appears that it is the practice of the appellate court, as evidenced by a uniform practice over a period of the last five years, to deny all petitions for rehearing in customs cases[10]?

Specification of Errors to be Urged

The Court below erred

(1) In finding and holding that definitions contained in "Digests of Trade Data" made and issued by the United States Tariff Commission in connection with a previously signed reciprocal trade agreement between the United States and a foreign sovereign state (specif. between the United States and Mexico) should be considered to evidence the common or joint intent of the negotiators of both High Contracting Parties.

(2) In finding and holding that the "Digests of Trade Data", a publication prepared by an independent agency of the federal government not charged by law with the right, duty, or responsibility of interpreting or of executing trade agreements with foreign governments, contains therein the meanings to be given to doubtful and ambiguous words used in reciprocal trade agreements between the United States and a foreign sovereign state (specif. between the United States and Mexico).

(3) In not relying upon information published by the United States Department of State on the day when the

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[9]—Petition for Rehearing (R. 319).

[10]—During the course of the last five years the appellate customs court has declined every petition for rehearing in a customs case. Not one petition has been granted; nineteen have been denied (Customs Appeals 4513, 4530, 4524, 4550, 4569, 4578, 4590, 4588, 4603, 4617, 4621, 4622, 4627, 4643, 4636, 4655, 4653, 4664 (twice). See Appendix, infra, for titles).

trade agreement with Mexico was signed (Specif. Department of State Bulletin, Vol. VII, No. 183-A, Publication 1861, December 26, 1942 Supplement) when interpreting doubtful and ambiguous words contained in this agreement.

(4) In construing and interpreting a trade agreement, a compact between two independent nations, as though it were a unilateral legislative act of the Congress with one side only to be considered—*i.e.*, the United States side; in giving effect only to the implied intentions of the American side of the negotiation; in deciding and holding in effect that the intent of the Mexican negotiators should be disregarded and ignored, or in assuming that the intent of the Mexican negotiators was the same as, or identical with, the intent of the American negotiators whose intent was found by the court below without supporting facts or evidence to be contained in a publication made and issued by the U. S. Tariff Commission; that, in effect, the intent of the Mexican negotiators should be found in matters to which they were not privy.

(5) In finding and holding in effect that the information contained in the "Digests of Trade Data" as published by the U. S. Tariff Commission was furnished to the negotiators of the trade agreement between the United States and Mexico—*i.e.*, the Mexican as well as the U. S. negotiators; in finding and holding in effect that the U. S. Tariff Commission defined and described leather huaraches to both teams of the negotiators of the trade agreement—*i.e.*, the Mexican as well as the U. S. negotiators.

(6) In finding and holding that neither the common meaning nor the commercial meaning to be given to the term "huaraches" was definitely established at the trial.

(7) In disregarding the evidence produced by qualified commercial witnesses at the trial about the meaning given

to the term "huaraches"; in not affirming and approving the condensed and codified common and commercial meaning given to this term as found by the trial court (R. 271); and in disregarding the evidence produced by each of the qualified commercial witnesses at the trial as to whether each exhibit in suit, each representing a distinct design or style of the imported footwear under protest, was or was not a "huarache".

(8) In refusing to correct, after timely requests to do so, the unsupported assumption that both parties to the Reciprocal Trade Agreement between the United States and Mexico were, during and prior to the Trade Agreement negotiations, aware of the definitions as contained in said subsequently issued "Digests of Trade Data".

(9) In reversing the judgment of the trial court on matters that were not before the court below for review—Specif. as to merchandise represented by Exhibits 1, 40, 41, 42 and 43.

(10) In finding and holding that the United States Customs Court erred in granting the motions to amend protests 120694-K, 120695-K, 122689-K and 126181-K.

(11) In reversing the judgment of the trial court as to the merchandise represented by exhibits 2 through 15, 17 through 20, 22, 23, 25, 27, 28, 30, 32 through 34, 36 through 39.

(12) In denying the original Petition for Rehearing as filed July 19, 1951.

(13) In denying the Second Petition for Rehearing as filed October 19, 1951.

(14) In reversing the judgment of the trial court.

(15) In not remanding the case to the trial court for further evidence (1) to establish whether or not the merchandise represented by exhibits 1, 40, 41, 42 and 43 was

covered by the protests as originally filed, and on which the court below assumed jurisdiction, or (2) to establish which, if any, of the items of merchandise under protest conformed to a new definition criterion approved by the court below but not connected at the trial with any of said merchandise.

Reasons for Granting the Writ

(1) The application and interpretation of new tariff classification language used in trade agreements is now of primary importance in determining the tariff status of most merchandise imported into the United States. Most of the statutory duty provisions have been modified by trade agreements since the enactment of the Trade Agreements Act in 1934. A volume of import trade valued at $1,766,500,000.00 per annum based on 1939 figures (which should be quadrupled to about $7,000,000,000.00 to reflect the present volume of trade[11]) was affected by the duty modifications obtained in 1947 under the Geneva Convention of the "General Agreements on Tariff and Trade"[12]. An additional volume of imported dutiable merchandise (not duty free) valued at $143,064,000.00 per annum based on 1948 figures was affected by the duty modifications obtained in 1949 at the Annecy Convention of G.A.T.T.[13]; and during this past year an additional volume of import trade valued at $478,000,000.00 per annum based on 1949

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[11]—Total imports in 1939 were valued at $2,318.2 million. Total imports in 1950 were valued at $8,734.5 million—"Monthly Summary of the Foreign Commerce of the United States", December, 1939, by Bureau of Foreign & Domestic Commerce, Department of Commerce, and Table 1, "Quarterly Summary of Foreign Commerce of the United States (Cumulative)" April 1951, by Bureau of the Census, Department of Commerce.

[12]—Department of State Publication 2983, Commercial Policy Series 109, page 133.

[13]—Department of State Publication 3651, Commercial Policy Series 120, page 138.

figures was affected by the duty modifications obtained at the recent Torquay Convention of G.A.T.T.[14]—Thus the recent trade agreement negotiations alone, irrespective of the volume of trade affected by previously signed trade agreements with individual countries, such as Mexico[15], have effected a volume of current trade valued at many billions of dollars.

(2) A large portion of the trade agreement tariff modifications contain specific items—*i.e.* "huraches"—not found in the original Congressional language of the statutory tariff act. Importers have long contended that this new language should be interpreted in accordance with commonly understood and trade accepted definitions, but the United States Court of Customs and Patent Appeals has not accepted this criterion. The court below takes the position that new ambiguous language contained in bilateral agreements between two or more sovereign states is to be interpreted in accordance with a peculiar extension of the rules applicable to unilateral legislation—*United States* v. *Good Neighbor Imports, Inc.*, 33 C.C.P.A. (Customs) 91, C.A.D. 321; *C. H. Powell Co., et al.* v. *United States*, 34 C.C.P.A. (Customs) 29, C.A.D. 340.

The lower court in the decision below has interpreted a commercial agreement as though it were a unilateral legislative Act of Congress and has applied the ordinary rules of legislative construction in interpreting a two party compact between sovereign nations. This holding and decision is in direct conflict with the settled principles of treaty[2] construction contained in decisions of this Court beginning at the very earliest times, wherein this court has held that a treaty is in the nature of a contract

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[14]—Department of State Publication 4209, Commercial Policy Series 135, page 288.

[15]—Individual bilateral trade agreements are now in effect with the following countries: Argentina, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Paraguay, Switzerland and Venezuela.

between two nations and not legislative acts. *Foster* v. *Nielsen,* 2 Peters 253, 314; *B. Altman & Co.* v. *United States,* 224 U. S. 583; *Fourteen Diamond Rings* v. *United States,* 183 U. S. 176, 182-184. The court below considered the "Digests" made and issued by the U. S. Tariff Commission after the execution and promulgation of the trade treaty or agreement with Mexico to be the history of the trade agreement and dealt with it as though it was the minutes of the proceedings of both sets of negotiators, Mexican as well as those of the United States, and therefore to be considered evidence of the common or joint intent of both of the High Contracting Parties and determinative of any doubtful or ambiguous language or words in the treaty.

The practice of the court below in relying upon "Digests of Trade Data" as indicative of the intention of both parties to the trade agreement negotiations stems from the *Good Neighbor Imports* decision (*supra*), in which case the importer filed no appearance and *made no argument on appeal.* The court in that case, relying upon the rule of interpretation applicable to unilateral Congressional acts for determining the intention of legislators when ambiguous words are used, as outlined in *United States* v. *American Trucking Association,* 310 U. S. 534, 542, assumed to apply the same rule to *bilateral* agreements without regard to the intentions of the second party to the agreement.

Thereafter the appellate customs court took a firm position about the status of these "Digests of Trade Data" and held in the case of *C. H. Powell Co., et al.* (*supra*):

> "That information obtained from the 'Digests of Trade Data', supra, is proper to be considered where there is ambiguity in the language used in the Reciprocal Trade Agreement *cannot be questioned.*" (Italics added.)
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> 34 C.C.P.A. (Customs), page 32.

Your petitioners feel that an extension of the rules for interpreting legislative intention which are applicable in cases involving Congressional unilateral legislation *should be questioned* when such rules are applied to bilateral trade agreements which govern the international trade between this country and foreign nations, where the court can neither be supplied with evidence about the intentions of the negotiators of the foreign government, nor be supplied with accurate data furnished to the U. S. negotiators.

Your petitioners know of no decision, and can find no legal authority, to support the position that evidence which tends to show the intention of one party to a bilateral agreement *ipso facto* represents the intention of both parties. The application of such a peculiar legal maxim to reciprocal trade agreements, which are now the primary basis for the assessment of duties upon goods imported into the United States, the life-blood of our foreign trade, seems to warrant the attention of this Court.

(3) While it is true that the trade agreement with Mexico, here involved, was cancelled by mutual agreement on September 6, 1950 (Presidential Proclamation #2901), after this case was tried, the same identical principles of law are raised in each and every case involving the interpretation of new ambiguous words used by trade agreement negotiators in making duty modifications designed to control or stimulate international commerce. Whether the customs courts are interpreting language used in bilateral trade agreements with such countries as Mexico, Argentina, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Paraguay, Switzerland, Union of South Africa or Venezuela[16] and resort to the definitions contained in pertinent

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[16]—These currently active bilateral trade agreements were put into effect by the following Presidential Proclamations: Argentina #1685, Costa Rica #1582, Ecuador #1951, El Salvador #1564, Guatemala #3989, Honduras #1075, Paraguay #3688, Switzerland #3917, and Venezuela #2375.

"Digests of Trade Data" prepared after each agreement by the U. S. Tariff Commission, or whether the customs courts are resorting to definitions contained in the similar 1948 "Summaries of Tariff Information" prepared by the same Tariff Commission in connection with the multilateral "General Agreement on Tariffs and Trade"[17], the same identical legal principles as raised in this case, are likewise raised in every other case involving the interpretation of ambiguous trade agreement language. The tendency to adopt these peculiar legal principles[18] will now become affixed for customs law purposes by reason of the decision of the court below in this case reaffirming their position as adopted in the cases of *Good Neighbor Imports, Inc., supra,* and *C. H. Powell Co., supra,* unless this Court is willing to act upon the matter.

Clearly, the questions presented here are of great importance to the administration of this nation's reciprocal trade agreement program and the tariff laws which the reciprocal trade agreements affect and modify. The court below has reaffirmed and adopted a policy for determining the meaning to be given to any ambiguous word used in any of the many trade agreements to which the United States is a party in a way to give effect only to the implied intent of the American side of the negotiation. If the aims,

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[17]—The multilateral General Agreement on Tariffs and Trade was signed by the United States at Geneva (1947) and thereafter extended at Annecy (1949) and Torquay (1951) to cover commercial trade relations with Australia, Austria, Belgium, Brazil, Burma, Canada, Ceylon, Chile, Cuba, Czechoslovakia, Denmark, Dominican Republic, Finland, France, Germany, Greece, Haiti, India, Indonesia, Italy, Korea, Liberia, Nicaragua, New Zealand, Norway, Pakistan, Peru, Union of South Africa, Southern Rhodesia, Sweden, Turkey, Uruguay and United Kingdom.

[18]—Copeland v. United States, 12 Cust. Ct. 85, C.D. 833; Fenton v. United States, 15 Cust. Ct. 200, C.D. 972; in Crosse & Blackwell v. United States, 18 Cust. Ct. 123, C.D. 1055, affirmed in Crosse & Blackwell v. United States, 36 C.C.P.A. (Customs) 33, C.A.D. 393; Landweer v. United States, 23 Cust. Ct. 171, Ab. 53576.

objectives, purposes and intent of a foreign government and its negotiators are not also to be similarly considered in determining the meaning to be given to such words contained in a reciprocal trade agreement and the goods of the foreign government are thereby subjected to higher customs duties than it believed would be applied under the agreement, then chaos and confusion in the international trade of this nation will ensue, our commercial relations with foreign countries will be adversely affected, and the congressional and executive national policies of encouraging trade and commerce with foreign nations will be defeated and frustrated. Moreover, foreign governments, in retaliation, can be expected to pursue a similar policy to the injury of our export trade.

The rule of trade agreement construction established and applied to the importers in this case will affect hundreds of other importers, thousands of other commodities and articles of commerce not here involved. The court below has announced and reaffirmed a rule applicable not merely to the Mexican trade agreement and in respect to the article of commerce here involved, but an unfortunate rule of construction which is applicable to all other trade agreements which have been, and are being, made.

(4) The decision of the lower court is believed to be contrary to, and in conflict with, the law as settled, and repeatedly reaffirmed, since the earliest days of this Court when construing words contained in revenue statutes. This rule was set forth succinctly in the case of *Arthur* v. *Cumming,* 91 U. S. 362—

> "The rule to be followed in the construction of revenue statutes in cases like this *is well settled in this court* (italics added). It is, that the descriptive terms applied to articles of commerce shall be understood according to the acceptation given to them by commercial men in our own ports at the time of the passage of the Act in which they are found."

See also *Two Hundred Chests of Tea,* 9 Wheat. 430; *Curtis* v. *Martin,* 3 How. 105; *112 Casks of Sugar,* 8 Peters 277; *Swan* v. *Arthur,* 103 U. S. 597; *Pickhard* v. *Merritt,* 132 U. S. 252; *American Net & Twine Co.* v. *Worthington,* 141 U. S. 468.

This commercial meaning should be given preference over the common meaning—(*Arthur* v. *Morrison,* 96 U. S. 108; *Newman v. Arthur,* 109 U. S. 132). It applies to new articles introduced into commerce after the revenue Act was passed (*Pickhard* v. *Merritt, supra*); and it "must be definite, uniform and general, and not partial, local or personal"—*Maddock* v. *Magone,* 152 U. S. 368; *Berbecker* v. *Robertson,* 152 U. S. 373.

The lower court in this case has declined to follow this "well-settled" rule applicable to the construction of revenue laws, and has created a new arbitrary set of rules of interpretation, not heretofore approved by this Court, to be applied when interpreting new words found in reciprocal trade agreements. This new rule disregards the meaning as commonly understood "by commercial men in our own ports", and looks primarily to extracts "drawn from" data supplied to the American negotiators of a trade agreement, but not to the negotiators of the foreign government.

Moreover, this new rule for interpreting words in a trade agreement seems to be in direct conflict with the position taken by this Court that a liberal construction should be given to words found in treaties and trade agreements—*Nielsen* v. *Johnson,* 279 U. S. 47; *Jordan* v. *Tashiro,* 278 U. S. 123; and *B. Altman* v. *United States, supra.* In fact this Court has held that compacts between nations should be more liberally construed than private agreements—*Choctaw Nation of Indians* v. *United States,* 318 U. S. 423, 431.

It is rare indeed that two recognized dictionaries or lexicographical authorities prepared by persons experi-

enced in the meanings to be given to words, will use the same phraseology to describe the same word; nevertheless, there is a uniform, definite common meaning for this word. Similarly, trade witnesses who are practical business men who seldom pretend to be scholars of the English language, cannot be expected to use the same phraseology to describe a well-understood definite, uniform expression commonly used in their trade. A commercial man can readily determine the trade nomenclature of an article of his trade when he physically inspects such article, but it is usually difficult for him to give an accurate precise explanation of his reasons for so doing. The courts should recognize that a trade witness' individual understanding of such a commonly accepted trade term is necessarily tinged by the particular phase of the business with which he is familiar. The lower court fails to take these facts into account. The lower court fails to accept a well-understood commonly used trade term as having a "definite meaning" if it appears that different qualified trade witnesses having long experiences in the same trade, do not use the same expressions and qualifying phraseology to define the same word. This position is carried so far in this case by the lower court that, even though every single one of the qualified trade witnesses who bought and sold a *variety of lines* pertinent to the word "huaraches"[19] *uniformly, unanimously* and *unquestionably* agreed that specified items of footwear handed to them for personal inspection were covered by their understanding of the word "huaraches", the court still felt warranted in disregarding such unanimous testimony upon the ground that such unanimous agreement did not establish a "definite" meaning. The lower court has extended the meaning of the term "definite" ("*definite,* uniform and general, and not partial, local or personal") as used in the cases of *Maddock*

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[19]—Witnesses Schmidli, Salem, and Sullivan do not meet these qualifications.

v. *Magone, supra,* and *Berbecker* v. *Robertson, supra,* to such absurd and unreasonable limits, as to make it almost impossible ever to establish a common commercial meaning, and makes impracticable the application of this Court's "well-settled" rule of construction to customs cases. The lower court has so distorted and restricted this "well-settled" rule that at least one member of that court has admitted that it is impossible to establish commercial designation in a contested case:

> "I think this court has gone too far in the way of restrictive rules applied to proof of commercial designation and I wish to state here that in some of those decisions which I think are the most offensive in this regard I participated and I was the author of one of them.
>
> We have come to a point where *it is almost impossible, if not entirely so,* (italics inserted) to make a case of commercial designation which will stand up in the customs courts if it is questioned by the opposing party."

(Judge Bland (deceased) dissenting, *United States* v. *Fung Chong Co.,* 34 C.C.P.A. (Customs) 40, 48, C.A.D. 342.)

Apparently this Court has never been asked or had the occasion to pass upon the rules of construction to be applied when interpreting words used in a trade agreement made under the Trade Agreements Act of 1934, as revised and extended. There is an urgent need for such action at this date and before the aforementioned arbitrary and unfair rules are more firmly imposed by the lower court upon the international trade of the United States and become firm fixtures of customs law.

The common and commercial meaning for the word "huaraches" was established at the trial of this case by the testimony of many qualified trade witnesses, and the trial court drew a fair and reasonable composite picture

of this meaning (R. 271). Your petitioners feel that this meaning should not be disregarded in favor of other inaccurate definitions which are not shown to be, and not even claimed to be, acceptable either to the trade or to the Bureau of Customs, Treasury Department[20], or even to the U. S. Tariff Commission itself which created the item[6].

The instant case is an apt and timely vehicle for consideration and decision by this Court of the important question of whether the Courts should (as your petitioners contend and as this Court has repeatedly held when construing words in revenue acts of Congress), or should not (as the court below has held and reaffirmed) apply a liberal commercially approved meaning in accord with the practical constructions of the Department of State to words contained in the many trade agreements recently negotiated and signed by this government.

(5) When the meaning of treaties is uncertain this Court has held that recourse may be had to the negotiations and diplomatic correspondence of the contracting parties and to their own practical construction of it—*Nielson* v. *Johnson, supra; Jordan* v. *Tashiro, supra; Choctaw Nation of Indians* v. *United States, supra.* The only available evidence in this respect indicates that the U. S. Department of State intended to lower the duty upon "practically all imports" of women's, misses' and children's woven leather shoes coming into the United States from Mexico, and not on only a segment thereof. See Department of State Bulletin, Vol. VII, No. 183-A, Publication 1861, page 1033, as

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[20]—After considering the definition of "huaraches" as contained in the "Digests of Trade Data" the Commissioner of Customs ruled on July 21, 1943, that "a huarache has a closely woven toe portion and some of the leather thongs forming the toe portion are extended to form a loop to fit about the heel of the wearer to hold the huarache on the wearer's foot"—Exhibit 50, R. 262-263.

published on the day when the Mexican trade agreement was signed:

> "Huaraches make up *practically all imports* of women's, misses' and children's shoes coming from Mexico." (italics inserted).

The court below applied this rule in such a way as to disregard and ignore the timely published intentions and practical constructions of the U. S. agency that conducted the trade agreement negotiations, and to adopt instead a subsequently issued definition by an agency that then had no official status as a negotiator. This in effect endows the Tariff Commission with treaty making powers at the expense of the State Department and creates executive and administrative confusion as between the various federal departments. Moreover, the holding and decision of the court below in this regard is believed to be erroneous and a misapplication of settled principles of treaty construction law enunciated by this Court in cases previously cited. It is important for this Court to resolve the administrative and executive conflicts in respect to treaty making powers created by the decision of the court below and to define authoritatively the proper scope and division of powers in such regard between the regular executive departments on the one hand and the United States Tariff Commission[3], an independent office or agency, on the other.

The settlement of the questions presented in this case as to what if any weight is to be given to timely statements made by the Department of State about the trade agreements it negotiates, is plainly in the public interest. It is important to have this principle of trade agreement construction settled authoritatively in the first instance and before greater loss has been suffered by importers and the nation's trade relations further disturbed and damaged.

(6) The orderly process of proceedings in an appellate court would seem to warrant court action only on facts

established of record or of common knowledge. The court below in this case has assumed facts that are not shown to exist and which are not of common knowledge, and has employed such assumed facts as a basis for reversing the judgment of the trial court. Your petitioners call upon an exercise of this Court's power of supervision.

The decision of the lower court is predicated upon the fact that the definition of "huaraches" contained in the "Digests of Trade Data" published by the United States Tariff Commission can properly be used in determining the meaning to be given to this word as contained in the Mexican trade agreement. This conclusion by the lower court is in turn based upon the *assumption* that such a definition was before the negotiators of both contracting parties at and prior to the negotiations leading up to the agreement (R. 286-287).

However:—

(a) The Mexican trade agreement was signed on December 23, 1942. The "Digests of Trade Data" were published on May 17, 1943, or five months after the agreement was signed (R. 306-307).

(b) There is no evidence before the court, factual or otherwise, to support a finding that the Mexican negotiators knew of the definitions contained in these "Digests" at or prior to the time when the Agreement was signed. All available facts show to the contrary.

(c) There is no evidence before the court, factual or otherwise, to support a finding that the United States negotiators were furnished with the same definitions as those contained in the "Digests".

(d) The Tariff Commission itself changed their definition of "huaraches" as found in these "Digests" and re-defined this term in 1948 by omitting all reference to their previous qualification that the heel of a "huarache" must be nailed on[6].

It is possible that over a period of five years a court never has need to change its statements or its rulings, but the refusal of the court below in the instant case to correct its statements and to refuse to reconsider a decision which it has assumed to base upon unestablished facts as pointed out clearly in the two Petitions for Rehearing, when coupled with the apparent consistent policy of that court during the course of the past five years to refuse to grant petitions for rehearing[10], seems to warrant a degree of beneficent supervision by this Court so as to insure that the fundamental judicial process for obtaining an impartial judgment based upon established facts, does not deteriorate into autocratic judicial chaos.

CONCLUSION

For the reasons stated above, it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

ALLERTON DE CORMIS TOMPKINS
Attorney for Petitioners

December, 1951.

APPENDIX

Paragraph 1530(e), Tariff Act of June 17, 1930 (46 Stat. 667; 19 U.S.C. Sec. 1001):

"Par. 1530 * * *

* * * * * * * * *

(e) Boots, shoes, or other footwear (including athletic or sporting boots and shoes), made wholly or in chief value of leather, not specially provided for, 20 per centum *ad valorem;* * * *."

The pertinent portions of duty modifications as made under the "Trade Agreement between the United States of America and the United Mexican States" signed December 23, 1942 and proclaimed by the President to be effective as to merchandise imported on or after January 30, 1943—57 Stat. 833, 892—are as follows:

"Tariff Act of 1930 paragraph	Description of article	Rate of duty
1530 (e)	Boots, shoes, or other footwear (including athletic or sporting boots and shoes), made wholly or in chief value of leather, not specially provided for:	
	Huaraches	10% ad valorem
	Slippers (for housewear)	10% ad valorem

1530 (e)	Men's, youths', and boys' boots, shoes, or other footwear (including athletic or sporting boots and shoes), made wholly or in chief value of leather, not specially provided for (except turn or turned, or sewed or stitched by the process or method known as McKay, or made by the process or method known as welt)	10% ad valorem."

Appendix

"United States Tariff Commission

Trade Agreement Between the United States and Mexico. Digests of Trade Data with Respect to Products on which Concessions were Granted by the United States".

(Issued May 17, 1943) (Parenthesis inserted)

In the foreword it is stated:

"The introduction to this volume consists of an analysis of the trade agreement between the United States and the Mexican Republic, signed December 23, 1942; a statement concerning the economy of Mexico; and data relating to trade between the two countries.

Following the introduction are digests of information concerning products on which concessions were granted by the United States in the trade agreement with the Mexican Republic. The material presented has been drawn from the detailed data made available by the United States Tariff Commission, prior to and during the negotiations with Mexico, to the Trade Agreements Committee, which is the interdepartmental body charged with carrying out the trade-agreements program. Practically all of this information was gathered by the Tariff Commission in compliance with that part of Senate Resolution 334, 72d Congress, 2d Session, which called for a revision of summaries of tariff information previously compiled by the Commission."

The definition of "huaraches" appears on page 223 under the heading "Description and Uses," and is as follows:

"Huaraches are leather-soled sandals having woven-leather uppers laced to the insole. The insole is

machine-stitched to the outsole, and the heel is nailed on. They are used principally by women and girls for beach and casual summer wear."

IDENTIFICATION OF DECISIONS, FOOTNOTE 10, WHEREIN THE U. S. COURT OF CUSTOMS AND PATENT APPEALS HAS WITHIN THE PAST 5 YEARS DENIED PETITIONS FOR REHEARING:

Rehearing denied 5/3/46 — United States v. Wm. S. Pitcairn Corp., 33 C.C.P.A. (Customs) 183, C.A.D. 334, Suit 4513;

Rehearing denied 6/7/46 — United States v. Canada Dry Ginger Ale, Inc., 34 C.C.P.A. (Customs) 12, C.A.D. 337, Suit 4530;

Rehearing denied 9/30/46 — United States v. Fung Chong Co., 34 C.C.P.A. (Customs) 40, C.A.D. 342, Suit 4524;

Rehearing denied 2/27/47 — Marshall Field & Co. v. United States, 34 C.C.P.A. (Customs) 141, C.A.D. 357, Suit 4550;

Rehearing denied 11/17/47 — Peat Products Corp. v. United States, 35 C.C.P.A. (Customs) 84, C.A.D. 375, Suit 4569;

Rehearing denied 2/10/48 — Roche-Organon v. United States, 35 C.C.P.A. (Customs) 99, C.A.D. 378, Suit 4578;

Rehearing denied 12/7/48 — United States v. H. S. Dorf & Co. of Pa., Inc., 36 C.C.P.A. (Customs) 29, C.A.D. 392, Suit 4590;

Rehearing denied 5/2/49 — United States v. Jovita Perez, 36 C.C.P.A. (Customs) 114, C.A.D. 407, Suit 4588;

Appendix

Rehearing denied 5/2/49 — Griffon Importing Co. v. United States, 36 C.C.P.A. (Customs) 121, C.A.D. 408, Suit 4603;

Rehearing denied 12/12/49 — Stan Newcomb & Barbara Todd v. United States, 37 C.C.P.A. (Customs) 18, C.A.D. 413, Suit 4617;

Rehearing denied 3/31/50 — United States v. Charles R. Allen, Inc., et al., 37 C.C.P.A. (Customs) 110, C.A.D. 428, Suit 4621;

Rehearing denied 3/31/50 — United States v. Paul Pankey & Co., 37 C.C.P.A. (Customs) 124, C.A.D. 429, Suit 4622;

Rehearing denied 6/13/50 — Geo. S. Bush & Co., Inc. v. United States, 38 C.C.P.A. (Customs) 30, C.A.D. 435, Suit 4627;

Rehearing denied 12/5/50 — C. S. Allen Corp. v. United States, 38 C.C.P.A. (Customs) 48, C.A.D. 438, Suit 4643;

Rehearing denied 2/2/51 — United States v. Union Olive Oil Co., Inc., 38 C.C.P.A. (Customs) 73, C.A.D. 442, Suit 4636;

Rehearing denied 6/26/51 — Balfour Guthrie & Co. v. United States, 39 C.C.P.A. (Customs) —, C.A.D. 457, Suit 4655;

Rehearing denied 9/28/51 — Vernon Distributing Co. v. United States, 39 C.C.P.A. (Customs) —, C.A.D. 463, Suit 4653;

Rehearing denied 9/28/51 — Weigert-Dagen, et al. v. United States, 39 C.C.P.A. (Customs) —, C.A.D. 464, Suit 4664;

Rehearing denied 11/5/51 — Weigert-Dagen, et al. v. United States, 39 C.C.P.A. (Customs) —, C.A.D. 464, Suit 4664.

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Trade Agreement between the United States and Mexico, 57 Stat. (Pt. 2) 833:
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In the Supreme Court of the United States

OCTOBER TERM, 1951

No 495

WEIGERT-DAGEN, WEIGERT-DAGEN SHOE CO., J. F. GOLDKAMP & CO., PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Customs Court (R. 264-276) is reported in 25 Cust. Ct. 105. The opinion of the United States Court of Customs and Patent Appeals (R. 278-290) is reported in 86 Treasury Decisions, Advance Pamphlet No. 41, October 11, 1951, page 37.

JURISDICTION

The judgment of the United States Court of Customs and Patent Appeals was rendered on June 26, 1951 (R. 291). A petition for rehearing was denied on September 28, 1951 (R. 325). A second petition for rehearing was denied on November 5, 1951 (R. 345). The petition for a writ of certiorari was filed on December 26, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. (Supp. IV) 1256.

QUESTIONS PRESENTED

1. Whether the Court of Customs and Patent Appeals erred in considering, as an aid in interpreting the term "huaraches" appearing in the Mexican Trade Agreement, information contained in certain Digests of Trade Data, the said Digests having been prepared and published by the United States Tariff Commission from information which it had previously submitted, prior to and during the negotiations with Mexico, to the Trade Agreements Committee, an interdepartmental body of the United States Government charged with carrying out the trade-agreement program.

2. Whether the Court of Customs and Patent Appeals erred in failing to hold that the testimony adduced in this case established a common or commercial meaning for the term "huaraches."

3. Whether the Court of Customs and Patent Appeals acted arbitrarily in denying the petitions for rehearing filed in behalf of petitioners.

STATUTE AND TRADE AGREEMENT INVOLVED

The pertinent parts of the Tariff Act of 1930 and the Trade Agreement entered into between the United States and Mexico are set forth in the Appendix, *infra,* p. 18.

STATEMENT

During the years 1943 and 1944, petitioners imported into the United States from Mexico at the ports of Laredo, Texas, and St. Louis, Missouri, certain footwear which was classified by the collectors of customs at Laredo and St. Louis, respectively, as "other footwear * * * not specially provided for" under the provisions of Section 1, Paragraph 1530(e) of the Tariff Act of 1930, *infra,* p. 18, with duty at 20 per centum ad valorem (R. 3-4, 9). The importers protested, contending that the footwear imported by them should have been classified as "huaraches" under Item 1530(e) of Schedule II of the Trade Agreement which had theretofore been entered into between the United States and Mexico, 57 Stat. (Pt. 2) 833, 892, *infra,* p. 18, with duty at 10 per centum ad valorem [1] (R. 8).

The collectors of customs at Laredo and St. Louis, respectively, affirmed their decisions (R. 9) and the protests and relevant papers were thereafter transmitted to the Customs Court in accord-

[1] It was stipulated by the parties in the court below that all of the protests involved in the case were substantially identical, that only one protest and collector's answer need be printed, and that such protest and answer should be deemed typical of all (R. 6).

ance with Section 515 of the Tariff Act of 1930 (46 Stat. 590, 734-735; 19 U. S. C. 1515). After a trial, at which extensive testimony was taken bearing on the common and commercial meaning of the term "huaraches," the Customs Court sustained the protests, holding that the footwear was properly classifiable as "huaraches"[2] under the Mexican Trade Agreement, with duty at 10 per centum ad valorem (R. 264-276). On appeal by the Government, the Court of Customs and Patent Appeals (one judge dissenting) reversed the decision of the Customs Court, holding that the footwear was not "huaraches" within the meaning of that term as used in the Mexican Trade Agreement, and that it was not, therefore, properly classifiable as such for duty purposes. In ascertaining that the imported footwear was not "huaraches" that court used as an aid in interpreting that term a definition thereof contained in the Digests of Trade Data prepared and published by the United States Tariff Commission, which Digests were said by the Commission to contain material drawn from the detailed data that it had submitted to the Trade Agreements Committee of the United States at the time the Mexican Trade Agreement was being negotiated.[3]

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[2] During the trial, the Customs Court, over the Government's objection, permitted amendments of certain of the protests to claim that the footwear there involved was properly classifiable as "slippers (for housewear)" under Item 1530(e) of the Mexican Trade Agreement. In its decision, the Customs Court sustained this claim (272-273).

[3] The Court of Customs and Patent Appeals also reversed the holding of the Customs Court that a part of the mer-

(R. 278-291.) Two petitions for rehearing were denied (R. 325, 345).

ARGUMENT

We submit that this case presents no question which warrants review by this Court. Section 1, Paragraph 1530(e) of the Tariff Act of 1930, 46 Stat. 590, 667, 19 U. S. C. 1530(e), *infra,* p. 18, laid a duty of 20 per centum ad valorem on certain footwear. Item 1530(e) in Schedule II of the Trade Agreement entered into between the United States and Mexico, *infra,* p. 18, lifted from the general terms of Paragraph 1530(e) of the said Tariff Act certain footwear known as "huaraches" and reduced the duty thereon to 10 per centum ad valorem. Thus the issue in the case concerns the interpretation, for duty purposes, of the term "huaraches" as used in the Mexican Trade Agreement. However, the Mexican Trade Agreement has been abrogated by mutual consent of the parties thereto. See 85 Treasury Decisions 252, 254. And we have found no provision in any

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chandise was classifiable as "slippers (for housewear)," on the ground that the Customs Court had erroneously permitted the applicable protests to be amended to claim a classification as slippers, the error of the Customs Court having arisen from the fact that the amendments added a new class of merchandise to the protests and amounted to new causes of action which had not been instituted within the 60-day statutory period permitted by Section 514 of the Tariff Act of 1930, 46 Stat. 590, 734, 19 U.S.C. 1514, for filing protests and were therefore untimely. The petition for a writ of certiorari does not urge this holding of the Court of Customs and Patent Appeals as a reason for the granting of a writ of certiorari.

other trade agreement setting up the term "huaraches" as a specific classification of merchandise as was done in the Mexican Trade Agreement. Thus, "huaraches" now appear to be again classifiable under the more general statutory term "footwear," appearing in Paragraph 1530(e) of the Tariff Act of 1930, as they were before the Mexican Trade Agreement was consummated. Consequently, the issue concerning the meaning of the term "huaraches" as a classification of merchandise is no longer of any significance. For that reason alone, the petition for a writ of certiorari should be denied.[4]

1. Petitioners contend (Pet. 12-13) that the court below erred in considering, as an aid in in-

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[4] Petitioners allude (Pet. 10-11) to a large volume of import trade which may be affected by the General Agreements on Tariffs and Trade negotiated at the Geneva, Annecy, and Torquay Conventions, 61 Stat. (Pt. 6) A1365-A2054; 86 Treasury Decisions, Advance Pamphlet No. 23, June 7, 1951, page 3. They infer (Pet. 15) that the use by the court below of material contained in the Digests of Trade Data as an aid to construction of the Mexican Trade Agreement in this case establishes a policy which will vitally affect the dutiable status, under other trade agreements, of a very large part of these potential imports. The inference is, of course, entirely unwarranted. There is no basis for assuming that an enormous number of trade-agreement terms are ambiguous, or that the court below will find a need to use material contained in Digests of Trade Data in a large number of cases. In large part, trade agreement tariff schedules in which the United States grants concessions are couched in Tariff-Act terminologies, and it is only in the cases where they depart from those terminologies, and in addition are ambiguous, that the ascertainment of the negotiators' intentions by extraneous aids may become important. And even in those cases, it cannot properly be said that the facts and circumstances will in every case be such as to require resort to like historical data.

terpreting the term "huaraches" appearing in Item 1530(e) of the Mexican Trade Agreement, a definition of that term contained in the Digests of Trade Data prepared and published by the United States Tariff Commission concerning the articles of merchandise on which the United States had made tariff concessions in the Mexican Trade Agreement. The definition of the term "huaraches" appearing in the Digests of Trade Data (p. 223), which was considered by the court below, reads as follows:

> "Huaraches are leather-soled sandals having woven-leather uppers laced to the insole. The insole is machine-stitched to the outsole, and the heel is nailed on. They are used principally by women and girls for beach and casual summer wear."

The trial court found that the footwear involved in the instant case did not conform to the above definition for a variety of reasons:

> Some because the uppers are only partly rather than wholly woven, some because the uppers are not laced through the insole, some because the insole is attached to the outsole by other than machine stitching, and some because the heel is not nailed on. (R. 266.)

In the foreward to the Trade Digests the Tariff Commission said:

> Following the introduction are digests of information concerning products on which con-

> cessions were granted by the United States in the trade agreement with the Mexican Republic. *The material presented has been drawn from the detailed data made available by the United States Tariff Commission, prior to and during the negotiations with Mexico, to the Trade Agreements Committee, which is the interdepartmental body charged with carrying out the trade-agreements program.* Practically all of this information was gathered by the Tariff Commission in compliance with that part of Senate Resolution 334, 72d Congress, 2d Session, which called for a revision of summaries of Tariff information previously compiled by the Commission. [Italics supplied.]

Petitioners' contention is based on their assertion that there is no evidence in the record or in the Digests of Trade Data themselves to show that the information from which the Digests were compiled ever came to the knowledge of the Mexican negotiators of the Trade Agreement with Mexico. From this premise, they argue that the information submitted by the Tariff Commission to the United States negotiators was evidence of the intention of only one of the High Contracting Parties, and that it may not, therefore, be properly considered as a manifestation of the intention of both parties to the Agreement.[5]

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[5] Petitioners have adduced no evidence whatever to show that the Mexican negotiators were not apprized of the definition for "huaraches" submitted by the Tariff Commission directly to the United States negotiators.

Petitioners' argument is without force. The foreword to the Digests of Trade Data prepared by the Tariff Commission, which is the agency authorized by law to furnish the President and the United States Trade Agreement negotiators with tariff information, states that the information contained in the Digests was drawn from detailed material which had been made available to the Trade Agreement Committee, the interdepartmental body charged with carrying out the trade-agreements program. This statement which appears in a published official document should be presumed to be authentic until shown to be otherwise. True, the document does not state specifically that the material therein contained was submitted to the Mexican negotiators, but in the absence of any evidence of a contrary contention advanced by the Mexican Government with respect to the definition of the term "huaraches" which had been adopted by the United States, it is reasonable to presume that the said definition was brought to the attention of the Mexican negotiators and accepted by them, or that it was later acquiesced in by the Mexican Government. This reasoning is implicit in the decision of the court below in this case, as well as in the prior decisions of that court holding that pertinent material in the Digests of Trade Data published by the Tariff Commission in connection with the British Trade Agreement might be used as an aid in interpreting ambiguous terms.

See *United States* v. *Good Neighbor Imports, Inc.*, 33 C. C.P. A. (Customs) 91; *C. H. Powell Co., et al.* v. *United States*, 34 C.C.P. A. (Customs) 29.[6]

Moreover, international agreements are negotiated by experienced and competent persons. Cf. *Rocca* v. *Thompson*, 223 U. S. 317, 332. In the circumstances, it is not credible that persons of that aptitude chosen for that task by the United States would insert in a reciprocal trade agreement a term such as "huaraches", which was peculiar to Mexico and only vaguely known to the American public, without discussing its meaning with the Mexican negotiators and calling to their attention the definition which the United States Government understood would govern its operating scope with respect to the concession granted by it.

The rule which permits reference to negotiations or preparatory works (*Nielsen* v. *Johnson*, 279 U. S. 47, 52) in interpreting ambiguous terms contained in international agreements seems to be one of necessity. Without it, the courts might find themselves with no means whatever to aid them in resolving issues involving ambiguous language in such agreements. This is particularly true in the matter of terms which classify merchandise for duty purposes, since such terms are more often

[6] The same reasoning would seem to underlie the rule that unilateral statements released by the State Department shortly after an international agreement has been signed may likewise be used in connection with ambiguous language employed in the agreement. See *Geo. W. Cole & Co., et al.* v. *United States*, 27 C. C. P. A. (Customs) 201, 206.

highly technical in nature and, in the main, have finely distinguished shades of meaning.[7]

The instant case is an outstanding example of the difficulty which would confront the courts if tariff information such as is involved here might not be used as an extraneous aid to interpretation. The term "huaraches" involved in this case, a Spanish word, particularly Mexican, is not comprehensively defined in the standard English dictionaries. Webster's New International Dictionary defines the term "huaracho" or "huarache" as "A kind of sandal:—usually *pl. Southwestern U. S. & Mex.*" Funk & Wagnalls New Standard Dictionary (1937 ed.) defines it as "A sandal in common wear among the West-Indians: generally in the plural." In the State Department's Press Release on the Mexican Trade Agreement, "huaraches" were said to be "woven-leather sandals." Department of State Bul-

[7] No doubt, the technical nature of these terms has given rise to the long-established rule which permits Summaries of Tariff Information prepared by the Tariff Commission for Committees of Congress to be used as aids in interpreting ambiguous terms appearing in the merchandise schedules contained in tariff acts enacted by Congress. See, *e. g., United States* v. *Blumenthal & Co.*, 13 Ct. Cust. Appeals. 407; *United States* v. *R. F. Downing & Co.*, 17 C. C. P. A. (Customs) 194; *United States* v. *Marshall Field & Co.*, 18 C. C. P. A. (Customs) 403, 406-407; *United States* v. *Clay Adams Co., Inc.*, 20 C. C. P. A. (Customs) 285, 291; *Sears, Roebuck & Co.* v. *United States*, 26 C. C. P. A. (Customs) 161; *C. H. Powell Co., et al.* v. *United States*, 34 C. C. P. A. (Customs) 29. See also *Sheldon & Co.* v. *United States*, 7 Ct. Cust. Appls. 454, wherein tariff information prepared in another agency for Committees of Congress prior to the creation of the Tariff Commission was likewise used.

letin, December 26, 1942, Supplement, Vol. VII, No. 183-A—Publication 1861, page 1051.[8] Patently, such definitions are inadequate as a basis for classifying merchandise for import duty purposes. And the advisory testimony on the meaning of the term "huaraches" adduced at the trial was hopelessly conflicting. Even the trial court stated that "Not all of the witnesses, even those called by the same party, were in agreement as to what was regarded as huaraches in the footwear trade of the United States at the time of the negotiation and promulgation of the Mexican Trade Agreement * * *" (R. 269).

Obviously, then, it would have been impossible for the court below to determine the common meaning of the term "huaraches" from these incomplete definitions or from the vague and conflicting statements made by the witnessees. Thus, it was both reasonable and necessary for the court below to look elsewhere for evidence tending to indicate the scope of the meaning which the parties to the Trade Agreement intended the term to have.[9] In the Digests of Trade Data, it found a comprehensive and practical description of that kind of foot-

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[8] That part of the State Department Press Release quoted in the petition (p. 20) clearly does not contain any workable definition of the term "huaraches."

[9] The reasonableness of this action by the court below is emphasized by comparing it with the reliance placed by the trial court on the partial statement of a witness that "huaraches" are "a type (of footwear) generally worn in Mexico" (R. 271), a meaningless piece of testimony which was completely lacking in the detail necessary to distinguish huaraches from other footwear.

wear, one which had been submitted directly to the United States negotiators of the Trade Agreement and which had thereafter been published for all to see. And in view of the fact that the term "huaraches" was peculiar to Mexico, and correspondingly strange to the English language, the court below could commit no error in presuming, especially in the absence of evidence to the contrary, that the definition was considered, understood, and accepted by both the United States and Mexican negotiators. In the circumstances, particularly since the issue involved a concession granted by the United States, the court below committed no error in using the pertinent material contained in the Digests of Trade Data as an aid in interpreting the term "huaraches," and its conclusion that the definition found in that material specified the meaning of that term as used in the Mexican Trade Agreement was clearly correct.

2. (a) Petitioners' contention with respect to the commercial meaning of the term "huaraches" is not entirely clear. They seemingly contended that the testimony of their witnesses was adequate to prove a commercial meaning for the term "huaraches" different from its common meaning (Pet. 15-17). They then attack the decision of the court below in the prior case of *United States* v. *Fung Chong Co.*, 34 C.C.P.A. (Customs) 40, with respect to its application of the rule governing the character and quantum of proof which must be adduced in order to prove a commercial meaning for im-

ported merchandise different from its common meaning. Petitioners have no status to urge this issue in this Court.

In the course of its opinion in this case the Customs Court said (R. 268-269):

> As has been said, it has not been established nor does it appear to be seriously contended that the commercial meaning of the term "huaraches" differs from the common meaning thereof. Therefore, the doctrine of commercial designation is not here invoked. Much testimony as to the meaning of the term in the trade and commerce of the United States which deals in huaraches was offered by both parties. *Since in this case there is no contention that the commercial meaning of the term differs from the common meaning thereof, this testimony, even though directed to the commercial meaning of the term, is applicable to the common meaning.* As the common meaning of the term is a question of law for the court to determine, such testimony in this situation is advisory only, and not binding upon the court, as it is offered as an aid to the determination of the common meaning of the term. [Italics supplied.]

Petitioners took no appeal from this holding. Indeed it is doubtful whether they might have, since they had not raised the question in the Customs Court. Manifestly then, petitioners were not in the court below, and are not here, in a position to attack the unappealed holding of the Customs Court that a commercial mean-

ing for the term "huaraches" had not been proved. In any event, the correctness of the application by the court below in other cases of the doctrine of the commercial meaning of imported articles, as distinguished from their common meaning, is not an issue before this Court in the instant case, since the court below had no occasion to apply that doctrine herein.

(b) With respect to the common meaning of imported articles, it is well established that evidence relating thereto is advisory only, and is not binding on either the trial court or the appellate court. See, *e.g., United States* v. *Flory & Co.*, 15 Ct. Cust. Appls. 156; *United States* v. *May Department Stores Co.*, 16 Ct. Cust. Appls. 353; *United States* v. *H. A. Caesar & Co.*, 18 C.C.P.A. (Customs) 106; *United States* v. *E. H. Sargent & Co., Inc.*, 20 C.C.P.A. (Customs) 172; *United States* v. *J. J. Gavin & Co.*, 23 C.C.P.A. (Customs) 288; *United States* v. *Best & Co., Inc., et al.*, 24 C.C.P.A. (Customs) 220; *United States* v. *O. Brager-Larsen*, 36 C.C.P.A. (Customs) 1.

In this case, even the trial court, although it concluded that the imported merchandise fell within the common meaning of the term "huaraches," expressed the view that the testimony relating to what the witnesses regarded as "huaraches", was not clear and was hopelessly in conflict (R. 268-269). The error of the trial court in concluding that the testimony established a common meaning for the term "huaraches", which encompassed the

merchandise at bar, is made more glaring by the stress and reliance (R. 271) which it placed on a vague portion of the testimony of petitioners' witness Dagen to the effect that "huaraches" were footwear generally worn in Mexico (See R. 31-32). Since the appellate court was not bound by the evidence adduced or by the conclusion of the trial court as to the common meaning of the term "huaraches", it was fully justified in holding that the vague and conflicting testimony of the various witnesses did not truly reflect a common meaning for that term. And since the term is undoubtedly ambiguous, it was entirely proper for the appellate court to employ an extraneous aid in order to ascertain the meaning which the negotiators of the Trade Agreement most probably had in mind. Having determined, on the basis of reasonably authentic information, that the merchandise involved did not come within the scope which the negotiators had in mind for the term "huaraches," as evidenced by the Tariff Commission's definition of that term, the court was clearly correct in reversing the judgment of the Customs Court, petitioners not having proved that the decisions of the respective collectors of customs were otherwise wrong.

3. Petitioners contend obliquely that the court below arbitrarily denied their petitions for rehearing (Pet. pp. 21-22). One ground advanced by them to sustain their contention is that the court

has denied petitions for rehearing in a large number of other customs cases. Rehearings are not often granted by other courts. Obviously, what the court has done in other cases has no relation to the instant case. Petitioners offered no facts to support their claim that the Mexican negotiators had no knowledge of the definition of the term "huaraches" contained in the Digests of Trade Data by the United States, or that the Mexican Government had raised objections to the use of that definition by the United States in carrying out the Trade Agreement. Consequently, petitioners have shown nothing to support even a suggestion that the action of the court below in denying their petitions for rehearing was arbitrary. Plainly then, this contention of petitioners is without substance.

CONCLUSION

The decision of the court below is clearly correct, and further review is not warranted. The petition for a writ of certiorari should therefore be denied.

PHILIP B. PERLMAN,
Solicitor General.

CHARLES J. WAGNER,
Acting Assistant Attorney General.

JOHN R. BENNEY,
Attorney.

JOSEPH F. DONOHUE,
Special Attorney.

JANUARY 1952

APPENDIX

1. Section 1, Paragraph 1530(e), of the Tariff Act of 1930 (46 Stat. 590, 667; 19 U.S.C. 1001, Paragraph 1530(e) provides in pertinent part:

> Paragraph 1530. * * *
>
> (e) Boots, shoes, or other footwear (including athletic or sporting boots and shoes), made wholly or in chief value of leather, not specially provided for, 20 per centum ad valorem * * *.

2. The pertinent portions of Item 1530(e) of Schedule II of the Trade Agreement entered into between the United States and Mexico, effective on or after January 30, 1943, 57 Stat. (Pt. 2) 833, 892, read as follows:

Tariff Act of 1930 paragraph	*Description of article*	*Rate of duty*
1530(e)	Boots, shoes, or other footwear (including athletic or sporting boots and shoes), made wholly or in chief value of leather, not specially provided for:	
	Huaraches	10% ad valorem
	Slippers (for housewear)	10% ad valorem

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

PETITION No. 495

WEIGERT-DAGEN, WEIGERT-DAGEN SHOE CO.,
J. F. GOLDKAMP & CO.,

Petitioners,

vs.

THE UNITED STATES,

Respondent.

REPLY TO BRIEF IN OPPOSITION

ALLERTON DE CORMIS TOMPKINS,
Attorney for Petitioners.

IN THE

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Respondent.

REPLY TO BRIEF IN OPPOSITION

Clarification appears necessary on the unsupported assertions of the Respondent in his "Brief for the United States in Opposition" (pages 12 (twice), 15 and 16) that the commercial meaning set forth by the trade witnesses for the term "huaraches" was "hopelessly conflicting".

At the trial of this case there was remarkable uniformity among all of the qualified trade witnesses[1] about the commercial meaning of the term "huaraches", each witness using his own method of expression to convey this meaning without parroting one another as the court below implies must be done to establish that a trade meaning is "definite" ("*definite,* uniform and general, and not par-

[1] Witnesses Schmidli, Salem and Sullivan had not bought and sold at wholesale a variety of lines pertinent to the word "huaraches".

tial, local or personal''—*Maddock* v. *Magone,* 152 U. S. 368).

Contrary to Respondent's unsupported assertions, it appears that the testimony of all of these qualified witnesses establishes, without conflict among themselves, that huaraches are an informal or casual type of Mexican leather footwear with at least partially woven uppers or vamps, some with heels and some without. Some of these witnesses indicate that the narrow leather strips in the uppers should be wholly or partly fastened to the soles, but others do not mention this fact or do not regard it as being an important qualifying factor:

Dagen, R. 31-32, 34, 45-46, 55
Kay, R. 59-60
Rubin, R. 70
Schimel, R. 76
Eppenberger, R. 77
Goldstein, R. 80
Weigert, R. 93, 95, 96-97
Shusterman, R. 108, 109
Fuchs, R. 112, 120
Schmitt, R. 133
Orenstein, R. 138, 140
Lichenstein, R. 218
Sherwood, R. 246

In addition all of these qualified trade witnesses agreed unanimously among themselves that Exhibits 1 through 39, 44, 45 and 46 were bought, sold and known as ''huaraches'' in the wholesale trade:

Dagen, R. 31
Kay, R. 59-62
Rubin, R. 70, 73
Schimel, R. 75-76
Eppenberger, R. 77
Goldstein, R. 79-80

Weigert, R. 93
Shusterman, R. 107
Fuchs, R. 112
Schmitt, R. 133-134
Orenstein, R. 138
Sam Lichenstein, R. 218
Sherwood, R. 238-244

Under these circumstances, it appears unreasonable that this unanimous testimony could accurately be referred to as "hopelessly conflicting". Such assertions on this relevant point are unsupported by appropriate record references, and they are most misleading. Indeed it seems to be this very disregard by the customs courts of such unanimity of commercial testimony that has caused the import trade such "keen concern", as evidenced by the Motion of the National Council of American Importers, Inc. for permission to appear as *Amicus Curiae:*

> "The U. S. import trade, as represented by the said National Council, is keenly concerned about the fundamental questions raised in said petition of:
>
> * * * * * *
>
> (2) Whenever traders use different words and unimportant qualifying language to express their views about a commonly accepted well-understood trade meaning of an ambiguous word contained in a trade agreement, is such commercial meaning to be ignored and disregarded * * *?"

(Page 2, Motion by National Council, as filed in this Court in this petition proceeding January 28, 1952.)

Reference by the Respondent to such trade testimony by qualified witnesses as being "hopelessly conflicting" or "vague and conflicting testimony" is unjustified and quite inaccurate; a mistake presumably made in good faith and deriving from the trial court's remarks commenting upon

the different statements made by each witness to express his understanding of the trade meaning, instead of quoting the same definition—The peculiar reasoning of the lower court as applied in this case, but not approved by this Court (now challenged in this Petition action), under which commercial designation cannot be established (on the ground it is not "definite") where all witnesses are not in complete agreement in every respect or use different unimportant qualifying phraseology about a trade term.

Respectfully submitted,

ALLERTON DE CORMIS TOMPKINS,
Attorney for Petitioners.

February, 1952.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

Petition No. 495

WEIGERT-DAGEN, WEIGERT-DAGEN SHOE CO., J. F. GOLDKAMP & CO.,

Petitioners,

v.

THE UNITED STATES,

Respondent.

MOTION FOR PERMISSION TO APPEAR AND FILE A BRIEF AS *AMICUS CURIAE*

The National Council of American Importers, Inc., a non-profit commercial body financed solely by membership dues, is the largest representative organization of American firms engaged in activities related to the United States import trade. It represents this trade as a whole and concerns itself with major developments affecting U. S. imports. Its membership consists of about six hundred and fifty concerns and individuals in all sections of the country actively engaged in all phases relating to the importation of a widely diversified line of merchandise.

The importers-petitioners in the above-named petition are not members of the National Council of American Importers, Inc., and the said National Council is not in-

terested in, or concerned about, the individual item of merchandise (Mexican footwear), the tariff classification of which is being contested in said petition.

The National Council of American Importers, Inc. has carefully investigated the principles involved in the above-named petition and has found that such principles are of fundamental and deep-rooted primary importance to the U. S. import trade. The U. S. import trade, as represented by the said National Council, is keenly concerned about the fundamental questions raised in said petition of:

(1) When interpreting an ambiguous word in a trade agreement which describes a commodity, what if any weight is to be given by the courts to the commercially accepted trade meaning given to this word by qualified traders who deal in the commodity related to such ambiguous word?

(2) Whenever traders use different words and unimportant qualifying language to express their views about a commonly accepted well-understood trade meaning of an ambiguous word contained in a trade agreement, is such commercial meaning to be ignored and disregarded in favor of definitions prepared in secret by a U. S. government agency, not shown to be acceptable to, or approved by, the trade in either country signing the trade agreement?

(3) What if any weight is to be given to statements relating to ambiguous language in a trade agreement, made by the United States Department of State on the day when the agreement is signed?

(4) When interpreting ambiguous words in a trade agreement, what if any weight is to be given to definitions published long after the trade agreement is made, which are extracted by a U. S. government agency from confidential data stated to be made available only to the U. S. negotiators of the trade agreement?

The foregoing fundamental points go far beyond the simple tariff classification issue in which the above petitioners are primarily interested.

The National Council of American Importers, Inc. finds after investigation that the said above petition provides a timely, apt, and perfect vehicle by means of which this Court can pass upon the pertinency and relevancy of the aforementioned questions, and that the further postponement of a final authoritative settlement of these questions will be of great and far-reaching damage to the import trade of the United States. For the foregoing reasons the said National Council desires to express its reasons for requesting the Court to grant the said petition.

Wherefore, the National Council of American Importers, Inc., through its duly authorized attorney, hereby—

Moves for permission to appear and file a brief as *Amicus Curiae* in the foregoing petition, No. 495.

National Council of American Importers, Inc.,

By: George A. Spiegelberg,
160 Broadway
New York 38, N. Y.,
Attorney.

Consented to:

Allerton de Cormis Tompkins,
Attorney for Petitioners.

Consented to:

(not signed—consent refused),
Solicitor General of the
United States of America.

January, 1952.

Affidavit

NATIONAL COUNCIL OF AMERICAN IMPORTERS, INC.
45 East 17th Street, New York 3, N. Y.

STATE OF NEW YORK
CITY OF NEW YORK } ss.:
COUNTY OF NEW YORK

HARRY S. RADCLIFFE, being duly sworn, deposes and says:

That he is the Executive Vice-President of the National Council of American Importers, Inc., 45 East 17th Street, New York, N. Y.; that at the meeting of the Board of Directors of the National Council of American Importers, Inc. on December 20, 1951, at which time twenty-nine Directors representing more than a quorum of the Board were present, the said National Council was authorized and empowered, through its duly authorized attorney, to appear and file a brief as Amicus Curiae in the matter of the Petition pending before the Supreme Court of the United States for a Writ of Certiorari to the United States Court of Customs & Patent Appeals in the case of *Weigert-Dagen, et al.* v. *United States,* No. 495.

That your deponent has read and knows the contents of the attached Motion for Permission to Appear and File a Brief as Amicus Curiae in Petition No. 495, and that the said Motion has been prepared and is being filed in accordance with the authorization of the Board of Directors, which is the governing body of the National Council of American Importers, Inc.

HARRY S. RADCLIFFE.

Subscribed and sworn to before me this 16 day of January, 1952 by Harry S. Radcliffe, known to me to be the

person whose name is subscribed to the within instrument and who in my presence swore to the truth of the statements made in the within instrument, except as to those matters therein stated to be alleged on information and belief, and as to those matters deponent stated that he believes the same to be true.

CHARLES COOPERSMITH,
Notary Public

(SEAL)